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Issue Date: 20 November 2002

CASE NO.: 2002 CAA 2
In the Matter of

LINDA GASS
Complainant

v.

U.S. DEPARTMENT OF ENERGY;
OFFICE OF THE INSPECTOR GENERAL, U.S. DEPT. OF ENERGY;
MR. JAMES PUGH; MS. SANDY SCHNEIDER;
LOCKHEED MARTIN CORPORATION; and,
LOCKHEED MARTIN ENERGY SYSTEMS, INC.
Respondents

Appearances:
Mr. Edward A. Slavin, Jr.
For the Complainant

Ms. Jacqueline M. Becker
For the U.S. Department of Energy ("DOE")

Mr. Robert M. Stivers, Jr.
For Lockheed Martin Energy Systems, Inc. ("LMES")

Before:
Richard T. Stansell-Gamm
Administrative Law Judge

RECOMMENDED DECISION AND ORDER -

APPROVAL OF MOTION TO DISMISS LMES;
APPROVAL OF MOTION TO DISMISS MR. JAMES PUGH;
APPROVAL OF MOTION TO DISMISS MS. SANDY SCHNEIDER; and
APPROVAL OF MOTION TO DISMISS DOE

This case arises under Section 322 (a) of the Clean Air Act, ("CAA"), 42 U.S.C. 7622; Section 1450 (i) (1) (A-C) of the Safe Drinking Water Act, ("SDWA"), 42 U.S.C. 300j-9; and, Section 7001 (a) of the Solid Waste Disposal Act, (SWDA"),42 U.S.C. 6971; as implemented by 29 C.F.R. Part 24.

Pursuant to a Notice of Hearing, dated July 24, 2002, I set a hearing date for this case on September 10, 2002 in Jacksonville, Florida. On August 6, 2002, I received Motions for Summary Decision or Dismissal from Ms. Becker and Mr. Stivers, on behalf of the U.S. Department of Energy ("DOE") and Lockheed Martin Energy Systems ("LMES"), respectively. After granting Mr. Slavin a couple of time extensions due to his litigation schedule and other factors, I received his response opposing the motions on November 1, 2002.

Background

On May 14, 2001, Mr. Slavin, on Ms. Gass' behalf, sent a letter to the Occupational. Safety and Health Administration ("OSHA"), U.S. Department of Labor ("DOL"), alleging that the Respondents were jointly and severally liable for violations against Ms. Gass of the whistleblower protection provisions of several environmental statutes. According to Mr. Slavin, Ms. Gass had filed a Freedom of Information Act ("FOIA")/Privacy Act request with the U.S. Department of Energy as part of her discovery process associated with a whistleblower case against LMES before Administrative Law Judge Michael P. Lesniak. Just a few days before Mr. Slavin's letter to OSHA, Ms. Gass had learned that the requested information was not available because it had allegedly been destroyed by a DOE employee(s). This purported action amounted to further retaliation against Ms. Gass due to her pursuit of whistleblower protection since the loss of the information had potentially adverse effect on her pending litigation against LMES. By the alleged acts of its employee, DOE had become a "joint" employer of Ms. Gass and perpetuated "the hostile working environment."

In response, on October 25, 2001, OSHA indicated to Mr. Slavin that it initially did not consider his letter another whistleblower complaint. However, upon consideration of the letter, OSHA concluded it did not have jurisdiction to investigate an alleged loss of potentially material evidence. Instead, OSHA believed that issue should be addressed by an administrative law judge. OSHA also concluded it lacked authority to investigate any asserted Federal agency's FOIA/Privacy Act violation. Consequently, OSHA dismissed Ms. Gass' complaint.

On November 1, 2001, Mr. Slavin submitted three requests for Ms. Gass to the Chief Administrative Law Judge, Office of Administrative Law Judges ("OALJ"). First, Ms. Gass requested a hearing on her whistleblower complaint against all Respondents. Second, Ms. Gass requested that her complaint be remanded to OSHA for investigation. And, third, in the event a remand was denied, Ms. Gass wanted her case to be consolidated with the case pending before Judge Lesniak, 2000 CAA 22.

The Associate Chief Administrative Law Judge, OALJ, forwarded the case to Judge Lesniak on November 14, 2001 for consideration of Ms. Gass' consolidation request.

After conducting a hearing on June 25, 2002 concerning the consolidation issue, Judge Lesniak determined on July 8, 2002 that consolidation was not appropriate because the two complaints involved separate and distinct issues and different respondents. As a result, Judge Lesniak

returned the case to OALJ and, as noted above, I issued a Notice of Hearing and then cancelled the scheduled hearing pending resolution of the motions for summary decisions and dismissals.

A. MOTION TO DISMISS LMES

Parties' Positions and Supporting Documentation

LMES

At the time of alleged violation of Ms. Gass' purported employee protection under the environmental statutes, LMES was neither her employer nor engaged in the activity claimed as the violation. Specifically, since Ms. Gass last worked for LMES in October 1996 and was terminated by the company in April 1997 due to long term disability, LMES was no longer her employer when she discovered the alleged violation in May 2001. Additionally, the claimed violation involves the asserted failure of DOE to properly response to a FOIA request and DOE's alleged destruction of evidence. LMES was not involved in either action. LMES' submission of a Motion for a Summary Judgment in Ms. Gass' other case pending before Judge Lesniak, 2000 CAA 22, does not amount to an adverse personnel action. Further, Ms. Gass has failed to identify any other alleged adverse personnel action taken against her by LMES in the relevant time frame of her present complaint. As a result, Ms. Gass' present complaint against LMES fails to state a viable employee protection claim and should be dismissed.

In support of its motion, LMES submitted excerpts from Ms. Gass' June 29, 1999 deposition. In her testimony, Ms. Gass indicated the she last time she was employed and worked was October 1996 for LMES. In a June 21, 2002 affidavit, Ms. Maureen M. Mendez, Director, Human Resources, as custodian of employment records for LMES, stated she reviewed Ms. Gass' employment records and determined that Ms. Gass' last day of active employment with LMES was October 17, 1996. When she stopped work, Ms. Gass went on short-term disability for six months. After that period disability, Ms. Gass started the long-term disability program. At that time, LMES terminated her employment effective April 17, 1997.

Ms. Gass

The Motion to Dismiss and Motion for Summary Decision should be denied because LMES is jointly and severally liable with DOE for the destruction of evidence. That destruction has violated Ms. Gass' right to full discovery and a fair hearing concerning her whistleblower complaint against LMES, 2000 CAA 22. Before Judge Lesniak, Mr. Slavin suggested that the 2001 destruction of discoverable information relating to the other case against LMES, 2000 CAA 22, is consistent with LMES' demonstrated pattern of retaliation, delay and destruction of evidence. Clearly, as the named respondent in Ms. Gass' other complaint, 2000 CAA 22, LMES was aware of that litigation and complaint and had demonstrated continued hostility against Ms. Gass. In the complaint presented by Mr. Slavin, he explains LMES' hostility stems from Ms. Gass' re-initiation of her whistleblower complaint in the DOL forum after Ms. Gass was "ensnared" by first submitting her complaint to DOE

for consideration. Finally, LMES' knowledge of, and involvement in , the destruction of evidence by DOE is a question of fact for trial.

Supporting Mr. Slavin's response to the motions is Ms. Gass' May 14, 2001 sworn verification that a representative of DOE on May 8 and 9, 2001 told her the material she had requested from DOE had been destroyed. Ms. Gass, individually, and through Mr. Slavin, also sent a June 24, 2002 letter to Judge Lesniak expressing her frustration with getting action taken on her environmental concerns. She indicates that after spending four years within LMES in an attempt to address the issues, she had to file a whistleblower complaint with DOL in 1995 and is still waiting for a resolution.

Discussion

Because neither 29 C.F.R. Part 24 (whistleblower proceedings) nor 29 C.F.R. Part 18 (procedures for administrative law judge hearings) address dismissal for failure to state a claim, the standards set out in the Federal Rules of Civil Procedure are applicable. *Freels v. Lockheed Martin Energy Sys.*, 95-CAA-2, 94-ERA-6, page 10 (ARB[1] Dec. 4, 1996). Under Federal Rule of Civil Procedure 12 (b) (6), dismissal may be appropriated if the facts in the case fail to state a claim. In considering whether dismissal is appropriate, the facts alleged in the complaint are taken as true, and all reasonable inferences are made in favor of the non-moving party. A dismissal in this situation is based solely on the legal insufficiency of the complainant's case. In other words, even if the complainant could prove all of his factual allegations, he would not prevail. See *Varnadore v. Oak Ridge National Laboratory,* 92-CAA-2 and 5, 93-CAA-1, 94-CAA-2 and 3, and 95-ERA-1 (ARB June 14, 1996), slip op., p. 36; *aff'd Vanadore v. Secretary of Labor, et al*, 141 F.3d 625 (6th Cir. 1998). On the other hand, a dismissal for failure to state a claim should not be granted according to the U.S. Court of Appeals for the Sixth Circuit "if the factual allegations of the complaint, after having been accepted as true and construed most favorably on behalf of the plaintiffs, present a cognizable claim if proved by the preponderance of the evidence." *Jones v. City of Lakeland, Tennessee*, 175 F.3d 410 (6th Cir. (Tenn.) 1999).

With these principles in mind, I note that LMES has presented two, separate reasons why Ms. Gass' complaint against LMES should be dismissed. First, Ms. Gass was not an "employee" within the meaning of the whistleblower statutes at the time of the alleged discriminatory action in 2001. Second, LMES is not responsible for the alleged retaliatory event.

Employment Status

Concerning the first factor, the issue of whether a complainant was an "employee" within the meaning of the environmental whistleblower statutes is a jurisdictional question. *Reid v. Methodist Medical Center of Oak Ridge*, 1993 CAA 4 (Sec'y April 3, 1995) *aff'd Reid v. Secretary of Labor,* 106 F.3d 401 (6th Cir. 1996) (table case; unpublished decision available at 1996 U.S. App

[1]Administrative Review Board or "Board."

LEXIS 33984).[2] LMES asserts the jurisdictional question is fairly clear because Ms. Gass was no longer an employed by LMES in 2001. Thus, since she was not an LMES "employee" at that time, her claim for protection under the statutes in regards to LMES should be dismissed.

While an important consideration, Ms. Gass' employment relationship status with LMES at the time of the alleged discrimination in 2001 is not the end of the analysis. In certain situations, even a former employee may still be able to invoke the employee protection provisions of the environmental statutes. In general, a former employee may bring a claim under the whistleblower statutes if the alleged retaliatory act relates to a protected activity while the individual was an employee, which includes pursuing a whistleblower complaint. *Delcore v. W.J. Barney Corp*, 89 ERA 38 (Sec'y April 19, 1995).[3]

Ms. Gass alleges the lost information is important to her present complaint against LMES, 2000 CAA 22, which involves events which occurred while she was employed by LMES. Thus, if LMES engaged in the destruction of information relating to her employment during the pendency of a post-employment lawsuit against it, then arguably that alleged act of information destruction may be sufficiently related to, or otherwise arise out of, her employment with LMES to enable her to bring the present complaint against LMES as a former employee. However, for the reasons noted below, I find such an connection does not exist. As a result, jurisdiction over LMES, as a former employer of Ms. Gass, is not present.

LMES Responsibility

Turning to the second, and key, basis for dismissal presented by LMES, I observe that Ms. Gass' complaint specifically identifies DOE, rather than LMES, as the entity responsible for the purported destruction of investigative notes, which is indeed the subject of her complaint. In other words, her complaint lacks any specific allegation that LMES participated in any manner in the information destruction. At best, other than naming LMES as a respondent, and again without making a specific allegation of inappropriate conduct by LMES in this matter, Mr. Slavin simply states LMES' "knowledge of and involvement in DOE IG's evidence destruction is a question of fact for trial." The fact that LMES is presently engaged in other litigation with Ms. Gass and the possible inference that LMES may benefit from the absence of the requested DOE information are insufficient, in the absence of a specific allegation that LMES actually did anything in 2001 concerning the requested evidence in DOE's possession, to support a whistleblower complaint against LMES on the basis of document destruction by DOE. Consequently, I find dismissal of Ms. Gass' complaint as it relates to LMES is appropriate.

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[2]Observing that the environmental statutes do not define the term "employee," the Secretary followed the U.S. Supreme Court determination in *Nationwide Mutual Ins. Co. v Darden.*, 112 S.Ct. 1344 (1992) that the term should be construed under common law principles.

[3]Examples of cognizable former employee claims are the refusal of re-employment and negative employment references. *Flanagan v. Bechtel Power Corp*, 81 ERA 7 (Sec'y June 27, 1986).

B. MOTION TO DISMISS INDIVIDUAL DOE EMPLOYEES AND DOE

Parties' Positions and Supporting Documentation

DOE

The complaints against DOE, and named individuals, should be dismissed because they were not Ms. Gass' employer as required by the environmental statutes.[4] The Secretary of Labor, as affirmed by the U.S. Court of Appeals for the Sixth Circuit, has determined the legal standard for determining employee status is the legal test set out by the U.S. Supreme Court in *Nationwide Mutual Insurance v. Darden*, 503 U.S. 318 (1992).[5] Applying the *Darden* employment factors to Ms. Gass' case, DOE never controlled her assignments or supervised her work. DOE did not control the circumstances of her employment, compensation, or termination. Additionally, no DOE employee ever supervised, managed, or evaluated her work.

DOE observes that Ms. Gass' complaint fails to contain any allegation that DOE was her employer. The agency also notes that in previous litigation by LMES employees against DOE, the Administrative Review Board ("ARB") has determined DOE was not their employer.[6] Based on the reasoning in this line of cases, the complaint against DOE should be dismissed. Even under the recently enunciated position by the ARB that the employment relationship might extend beyond the immediate employer,[7] DOE is not an employer because the agency did not act as her employer by establishing, modifying or interfering with her compensation, terms, conditions, or privileges of employment.

Additionally, DOE was not involved in any retaliatory action against Ms. Gass. DOE has not improperly destroyed any information. Even if DOE had engaged in such destruction, Ms. Gass has failed to demonstrate how such alleged destruction constitutes either retaliation or an adverse personnel action which affects her terms and conditions of employment with LMES in any way.[8]

In support of its motion, DOE presented the May 17, 2002 declaration of Ms. Melanie M. Kent, Chief of Personnel and Management Analysis Branch of DOE in Oak Ridge, Tennessee. According to Ms. Kent, the DOE employment record system indicates Ms. Gass has never been an

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[4]The Clean Air Act, the Solid Waste Disposal Act, and the Safe Drinking Water Act.

[5]*See Reid*, 1993 CAA 4, slip op. at 11-12.

[6]For example, *see Varnadore v. Oak Ridge National Laboratory*, 1992 CAA 2 and 5, 1994 CAA 2, and 3, and1995 ERA 1, slip op. at 35 (ARB June 14, 1996);. *Freels v. LMES*, 1995 CAA 2 and 1994 ERA 6 (ARB Dec. 4, 1996) and *Kesterson v. Y-12 Nuclear Weapons Plant*, 1995 CAA 12 (ARB April 8, 1997).

[7]*Stephenson v. National Aeronautics & Space Administration*, 1994 TSC 5 (ARB July 18, 2000).

[8]DOE also objected to consideration by DOL of the FOIA issues raised by Ms. Gass. As discussed later, I view the gravamen of the complaint as the destruction of documents and do not address the FOIA issue.

employee of DOE at Oak Ridge. DOE did have a contract with Ms. Gass' former employer, LMES, to operate and manage DOE's facilities at Oak Ridge. While Ms. Gass worked for LMES in the DOE facilities, LMES, and not DOE, was responsible for personnel actions relating to her employment including supervision, assignment of work, compensation, benefits, and evaluation. No DOE employee ever supervised or evaluated Ms. Gass' work. Also, the contract between DOE and LMES expressly provides that individuals employed by LMES are not deemed to be DOE employees.

The June 1995 Statement of Work from the DOE/LMES contract requires the contractor to manage the missions of the DOE facilities at Oak Ridge "in a manner consistent with the DOE Strategic Plan and the principles of performance-based contracting." Although DOE retains "general" control over LMES, the document states the contractor is responsible for employment of all personnel engaged in work under the contract. Such employed individuals are employees of the contractor and are not employees of DOE or the Federal Government.

Ms. Gass

The Motion to Dismiss on behalf of the two individuals should not be dismissed because a strong public interest exists to expose government wrongdoing. The current DOL law should be modified to address the destruction of information by individuals which is requested for a whistleblower trial. In particular, Ms. Schneider should be held personally responsible since she directed the destruction of the evidence. Because this issue involves an issue of truthfulness, a hearing, rather than a dismissal, is warranted.

The Motion to Dismiss and Motion for Summary Decision by DOE should be denied for diverse reasons.[9] First, in light of the DOE/LMES contract, DOE exercised sufficient control to become Ms. Gass' employer within the meaning of the environmental statues. Several clauses of the DOE/LMES contract's statement work require that LMES respond to DOE guidance, instructions or directives. At least one member of the ARB upon review of similar contract terms believed DOE should be considered a joint employer of an LMES employee.

Second, since DOE has not denied under oath the destruction of evidence allegation, DOE has become a joint employer of Ms. Gass. The destruction of "material evidence" has "endangered" Ms. Gass' pending whistleblower law suit against her former employer LMES, which was also a contractor for DOE. Aware of Ms. Gass' pending whistleblower litigation against its former sub-contractor, DOE retaliated against Ms. Gass and purposefully adversely affected her "rights to full discovery and a fair trial," thereby violating her employee protection rights under the environmental statutes. The loss of DOE "investigative documents permanently deprives Ms. Gass of the right to admissible evidence" in her pending whistleblower case.

[9]In his response, Mr. Slavin also requested that I require DOE to submit a sworn response and remand the case for an OSHA investigation. I note the absence of any stated authority for the first request. Additionally, considering OSHA has already declined to further pursue the complaint, I see little utility in a remand at this time.

In the consolidation hearing before Judge Lesniak, Mr. Slavin further explained the protected activity in Ms. Gass' complaint before me is her participation in the pending whistleblower complaint against LMES, 2002 CAA 2, presently before Judge Lesniak.[10] Both DOE and LMES were aware of her complaint which generated the 2002 CAA 2 case. With that knowledge, the adverse action was DOE's destruction of investigative agent notes which involved the circumstances of her 2002 CAA 2 complaint of retaliatory action by LMES for protected activity while she was an LMES employee. Consequently, under the joint employer principle, DOE has become Ms. Gass' employer for purposes of the environmental statutes.

Discussion

Prior to examining the various Motions to Dismiss relating to DOE and named individuals, I note that Ms. Gass in her complaint only specifically named three environmental statutes CAA, SWDA, and SDWA. Although Mr. Slavin included the phrase "other environmental statutes," I consider that language sufficiently vague to warrant the extension of my analysis beyond the three specifically referenced statutes.

Additionally, because Ms. Gass' complaint is partially cast in terms of a FOIA violation, some collateral jurisdictional issues initially appear to surface. Notably, the ARB has previously determined that a failure to waive a FOIA search fee, which had the potential effect of precluding a complainant from retrieving possibly relevant information concerning a purported whistleblower protection violation, is not discrimination with respect to compensation, terms, conditions or privileges of employment.[11]

While I have considered the ARB's holding, I note that unlike the situation before the ARB, the crux of Ms. Gass' complaint is the purported destruction of investigative notes apparently concerning her employment with, and discrimination suit against, LMES, rather than DOE's failure to comply with her FOIA request. The FOIA request just served as the means for Ms. Gass to discover the documents no longer existed; whereas in the ARB case, the agency's failure to waive a FOIA fee was the alleged discrimination. As a result, I do not believe dismissal of her complaint simply based on the inclusion of a FOIA grievance is warranted.[12]

Complaints Against DOE Individuals

In Ms. Gass' complaint, Mr. Slavin included Mr. James Pugh and Ms. Sandy Schneider, DOE employees, as named respondents. When I issued the Notice of Hearing, I indicated in a footnote that neither had participated so far in the proceedings relating to Ms. Gass' May 2001 complaint through

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[10]June 25, 2002 Hearing Transcript, page 8.

[11]*See Rockefeller v. U.S. Department of Energy*, 1998 CAA 10, slip op. at page 10 (ARB Oct 31, 2001).

[12]Whether Ms. Gass has a separate cause of action relating to DOE's purported non-compliance with FOIA is a question for some other forum.

Judge Lesniak's consolidation hearing. I also stated that such individuals may not be considered "employers" under the environmental statutes and thus I did not include their names in the case caption. However, during the presentation of these motions, DOE has specifically asked that I dismiss these two named individuals as named respondents and Ms. Gass objects to such an order.

Ms. Gass alleges that both Mr. Pugh and Ms. Schneider violated the employee protection provision of the CAA, SWDA, the SDWA. Based on the contents of the complaint, Mr. Pugh appears to be the DOE employee who informed Ms. Gass that information she had requested had been destroyed. The complaint identifies Ms. Schneider as an attorney in the Inspector General's ("IG") Office of DOE, and IG complaint manager, who allegedly ordered the destruction of the information.

To determine whether these named individuals are subject to the whistleblower discrimination prohibition provisions of the three named environmental statutes, a review first of the specific statutory language, including the use of the terms "employer" and "person" and then consideration of subsequent ARB interpretations of those provisions provides an important analytical framework.[13]

Clean Air Act

The Clean Air Act was enacted to create incentives and uniform regulation for pollution control of unregulated pollutants and unregulated sources of air pollution. Within the CAA, Section 7622 (a) states, "No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee" engaged in a protected activity under the Act (emphasis added). The CAA indicates that "any employee who believes that he has been discharge or otherwise discriminated against by any person" in violation of the prohibition in Section 7622 (a) may file complaint with the Secretary of Labor ("Secretary") (emphasis added). Upon receipt of the complaint, the Secretary notifies "the named person in the complaint" (emphasis added). In terms of authorized relief, Section 7622 (b) (2) (B) provides that if the Secretary determines a violation has occurred:

> [T]he Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant (emphasis added).

[13]In his brief opposing the motions, Mr. Slavin incorporates a portion of Ms. Gass' complaint. In footnote 4 of that referenced complaint, Mr. Slavin lists a series of cases (without specific case comment, holdings or page numbers) to support his proposition that managers who commit violations of the whistleblower provisions should be held personally liable for their conduct. The footnote introduces the series as cases holding individual managers responsible for work place harassment. None of the cited cases involve environmental whistleblower protection provisions.

In the CAA definition section, which is applicable to all portions of the Act including both the environmental directives and the employee protection provisions, subparagraph 7602 (e) defines "person" as an individual, corporation, partnerships, association, State, municipality. . .and any agency, department or instrumentality of the United States and any officer, agent, or employee thereof." However, the term "employer" is not defined.

When confronted with the issue of whether a federal employee could be named as a respondent in a CAA complaint, the Secretary in *Stephenson v. National Aeronautics & Space Administration*, 1994 TSC 5 (Sec'y July 3, 1995), Decision and Order on Remand, slip op. at page 2, observed that while several paragraphs in the CAA's whistleblower provisions reference "person," the "substantive prohibition" contained in 7622 (a) referenced "employer." The Secretary found that "the plain language of these employee protection provisions suggests that they were intended to apply to persons who are employers . . . Any other construction would require a clearer statement of intent . . ." As a result, the Secretary concluded that only employers are subject to the employee protection provisions of the CAA. *Id.* at page 3.

Based on the employment status alleged in the complaint, Mr. Pugh and Ms. Schneider are DOE employees. Clearly if DOE never employed Ms. Gass, then neither Mr. Pugh nor Ms. Schneider were in position to be her employers. In light of the Secretary's determination in *Stephenson*, since Mr. Pugh and Ms. Schneider did not employ Ms. Gass, the employee protection prohibition provisions of the CAA do not apply to them. Consequently, the portion of Ms. Gass' complaint alleging violations under CAA against Mr. Pugh and Ms. Schneider must be dismissed.

Safe Drinking Water Act

The Safe Drinking Water Act was enacted to establish criteria and quality control testing procedures to insure a safe supply of drinking water to protect the public welfare. In a manner nearly identical to the CAA provisions, Section 300j-9 (i) (1) states that no "employer" (emphasis added) may discharge or adverse affect any employee's employment status. Likewise, Section 300j-9 (i) (2) (A) provides any employee who believes he has suffered prohibited discrimination "by any person" may file a complaint with the Secretary of Labor (emphasis added). As a remedy for an established violation, Section 300j-9 (i) (2) (B) (ii) directs the Secretary to order the person who committed the violation to take affirmative action abating the violation including reinstatement to former position, compensation (including back pay), restoration of the terms, conditions, and privileges of employment, compensatory damages and where appropriate exemplary damages (emphasis added).

The SDWA definitions, Section 300f-12, includes individual, Federal agency, and employees of a Federal agency within the meaning of "person." Similar to the CAA, the term "employer" is not defined.

Although the remedy section in the SDWA is slightly more expansive than the language in the CAA, the prohibition and complaint sections, with reference to "employer" and "person," parallel the

language in the CAA. As indicated above, the Secretary has interpreted that similar statutory language with references to both terms in the CAA to mean only employers are subject to the employee protection provisions. Consequently, for the same reason concerning the complaints under the CAA, Ms. Gass' complaints under the SDWA against Mr. Pugh and Ms. Schneider should be dismissed.

Solid Waste Disposal Act

The Solid Waste Disposal Act was enacted to ensure that discarded materials be disposed of in an environmentally sound manner and to regulate and upgrade all current open dump sites and provide incentives to upgrade landfills and resource recovery facilities. In this statute, the prohibition provision differs from the CAA and SDWA in two ways. First, in place of the term, "employer," Section 6971 (a) states, "No person shall fire, or in any manner discriminate, or cause to be fired or discriminated against, any employee. . ." because the employee engaged in a protected activity under the Act (emphasis added). Second, in addition to prohibiting acts of discrimination, the statute prohibits a person "causing" the employee to be fired or discriminated against.

The remedy section of the SWDA also differs from the CAA and SDWA. Under the SWDA, no specific remedy of compensatory or exemplary damages is set out. Instead, Section 6971 (b) indicates that if a violation has occurred, the Secretary shall require "the party committing such violation to take such affirmative action to abate the violation as the Secretary of Labor deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee. . . to his former position with compensation."

The SWDA definition provision, Section 6903 (15), contains no definition for employer and describes the meaning of "person" as "an individual. . .corporation. . .partnership. . .association. . .State, municipality. . .[and includes] each department, agency, and instrumentality of the United States."

The analysis of whether Mr. Pugh and Ms. Schneider are subject to the employee protection provisions of the SWDA is more involved than under the CAA or SDWA, in part, due to the notable substitution of the term "person" for the word "employer" in the prohibition provision. Additionally, although the ARB has not definitively address the issue of individual responsibility under SWDA for employee discrimination, at least one member of the ARB believes the SWDA's employee discrimination prohibition may apply to an individual who is not the complainant's employer.

In *Williams v. Lockheed Martin Energy Systems, Inc.*, 1995 CAA 10 (ARB Jan. 31, 2001), slip op. at pages 16-17, an appellate administrative law judge added as further justification for his dissenting opinion on jurisdiction that the use of the word "person" rather than "employer" in the SWDA employee discrimination prohibition section prevented the dismissal of a complaint under the SWDA against an individual who was not the complainant's employer. The judge observed the SWDA includes "individual" within the meaning of "person" and that such language had been held

by the Secretary to impose liability.[14] Thus, substituting "individual" for person meant SWDA prohibited an individual from discriminating against, or causing discrimination against, an employee.

With due difference to the ARB appellate judge, and recognizing the logic of his presentation, I believe focusing on that word substitution alone is too narrow an approach. Based on my interpretation of the entire SWDA employee protection section, I find, at a minimum, that employees of the Federal government are not exposed to personal liability under this section.

In attempting to interpret the employee protection provisions of the CAA, the Secretary in *Stephenson* first found an ambiguity within the section (the use of "employer" and "person" in the prohibition section and "person" in the remaining sections, including the remedy provisions) as a basis for then interpreting the statute beyond its plain language. In light of that internal conflict, the Secretary interpreted the statute by considering all the provisions together. The same interpretative process is warranted concerning the SWDA.

The dissenting ARB appellate judge found no ambiguity in the use of the term "person" in the prohibition section. I agree with his observations that the SWDA term of "person" is both clearly defined to include "individual" and the prohibition section uses only the term "person." However, the use of that term becomes ambiguous when the employee protection provision is read as a whole and focus is turned on the remedy section.

In the remedy section, the SWDA sets out two specific examples of relief required of a "person" who commits discrimination: rehiring or reinstatement. If that term "person" is read as "employer," the remedy section makes sense. However, the stated remedies becomes non-effective if "person" includes an "individual" who is not also an employer since only an employer has the power to abate an employee protection violation by rehiring or reinstating the aggrieved complainant. I believe this apparent conflict between the prohibition section and the remedy provision produces a sufficient ambiguity to warrant an interpretation based on the entire section as a whole rather than the defined meaning of "person" as an "individual."

In that regard, the apparent purpose of the employee protection provisions in environment statute situations is to remove the ability of employers to use their economic power over employees

[14]The appellate judge did not reference any environmental case to support his position. He did cite a case under the Surface Transportation Assistance Act ("STAA"), *Ass't Sec. of Labor v. Bolin Associates*, 1991 STA 4 (Sec'y Dec. 30, 1991) which included an observation that the administrative law judge did not have to pierce the corporate veil to hold a company CEO personally liable since the statute referenced "person." In regards to that case, I note that at the time of the case the U.S. Government did not waive sovereign immunity for itself or its employees under the STAA and specifically excluded itself and its employees from the definition of "person," *see* 49 U.S.C. § 2301 (4)5 (b). The present definition section of the STAA, 49 U.S.C. § 31101, no longer contains a definition for "person" and the U.S. Government is expressly defined as not being an "employer."

to discourage whistleblower activities by retaliatory adverse personnel actions and discharge.[15] Whether the term "employer" or "person" is utilized in the prohibition section, the remedy portion of the SWDA shows an intention to have employers, rather than individuals who are not employers, to make whole a wronged employee. Such an approach is consistent with the other two environmental statutes, CAA and SDWA, which impose on the employer, rather than any of its employees, the obligation to right an whistleblower wrong. Particularly in light of the sanction section of the SWDA, I see no stated reason to treat a whistleblower violation under that Act any differently.[16]

I note that while one member of the ARB believed individual employees could be named respondents under the SWDA, the Secretary in the regulations implementing the three environmental statutes, uses the term "employer." After indicating in 29 C.F.R. § 24.1 (a), that the CAA, SDWA, and the SWDA, among other environmental laws, are covered by the regulatory provisions, 29 C.F.R. § 24.2 (a) states: "No employer subject to the provisions of any of the Federal statutes listed in § 24.1 (a) . . . may discharge any employee or otherwise discriminate against any employee's compensation, terms, conditions, or privileges of employment. . .[due to a protected activity under the statutes and regulations]" (emphasis added). The same regulation does not set out any such prohibition for an individual, or person, who is not an employer.

In this particular case, Ms. Gass has named Mr. Pugh and Ms. Schneider personally as respondents in her complaint of whistleblower discrimination. Under the CAA and SDWA, if DOE were determined to be Ms. Gass' employer,[17] and Mr. Pugh and/or Ms. Schneider committed an act of employment discrimination through an adverse personnel action affecting Ms. Gass, DOE, rather than Mr. Pugh or Ms. Schneider, is the entity responsible for providing an appropriate remedy. Since DOE has control of Mr. Pugh and Ms. Schneider, holding that agency responsible for any such actions of its employees is reasonable.

In the same scenario, under the SWDA, if the term "person" includes individuals who are not employers, then the SWDA looks to Mr. Pugh and Ms. Schneider for remediation in the event of a whistleblower protection violation. Yet, as federal employees of DOE, they do not appear to have any authority to provide the mandated remedies of re-employment or reinstatement. On the other

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[15]In *Reid v. Methodist Medical Center of Oak Ridge*, 1993 CAA 4 (Sec'y Apr. 3 1995), slip op., page 6, the Secretary observed that a Congressional committee comment on the CAA reflected the belief that "the best source of information about what a company is actually doing or not doing is often its own employees. . .[an inclusion of an employee protection provision] would insure that an employee could provide such information without losing his job or otherwise suffering economically from retribution from the polluter."

[16]In other words, based on the Secretary's interpretation of the CAA statute, if Congress intended only employers to be subject to the discrimination prohibitions of the CAA and SDWA, why would Congress then expand the prohibition to persons who are not employers under the SWDA while at the same time emphasizing in the SWDA re-employment and reinstatement as remedies and not specifically mentioning compensatory damages found in the CAA and the compensatory and exemplary damages remedies in the SDWA?

[17]I will discuss that issue next concerning the Motion to Dismiss DOE.

hand, if "person" under the SWDA, in a manner consistent with the CAA and SDWA, does not include such individuals as Mr. Pugh and Ms. Schneider, then the SWDA, again in a similar fashion as the CAA and SDWA, holds DOE responsible for the appropriate remedies which DOE does have the power to accomplish.

In summary, for the reasons stated above, I find the whistleblower discrimination prohibition provision of the SWDA does not apply to individuals who are not the complainant's employer. Likewise, as previously determined, neither Mr. Pugh nor Ms. Schneider ever employed Ms. Gass. Consequently, Ms. Gass' complaints under the SWDA against Mr. Pugh and Ms. Schneider should be dismissed since they were never her employers.

One final comment concerning the complaint against Mr. Pugh. Even if I had interpreted the SWDA in a manner that would permit holding a non-employer individual liable, Ms. Gass' SWDA complaint against Mr. Pugh should still be dismissed because she alleges no wrong doing on his part. As set out in her complaint, Mr. Pugh's only stated transgression is informing Ms. Gass that the documents she had requested had been destroyed. Notably, the complaint does not allege that he destroyed the requested information.

Complaint Against DOE

DOE asserts that since it never employed Ms. Gass, the agency is not an "employer" within the meaning of the environmental statute. While never asserting direct employment with DOE, Ms. Gass believes DOE's act of destroying documents makes the agency a joint employer with LMES.

As a starting point in evaluating this jurisdictional issue, I observe that the Federal Government has specifically waived sovereign immunity, by definition in cases involving CAA and SDWA, and by implication in the SWDA through the Federal facilities provision.[18] Therefore, if DOE, as an agency of the Federal Government, was Ms. Gass' employer, then the agency is subject to the whistleblower prohibitions in the CAA, SDWA, and SWDA.

Next, I return to the decisions of the Secretary and ARB concerning the meaning of the term "employer." In *Reid v. Methodist Medical Center of Oak Ridge*, 1993 CAA 4 (Sec'y Apr. 3, 1995), slip op., page 11, to determine the meaning of "employee," the Secretary adopted the common-law principles of an employer-employee relationship enunciated by the U.S. Supreme Court in *Nationwide Mutual Ins. Co. v. Darden*, 112 S.Ct. 1344 (1992). In light of those common law factors, and upon consideration of Ms. Gass' complaint, Ms. Kent's declaration, and the DOE/LMES contract, I find insufficient indices of a traditional employer-employee relationship between Ms. Gass and DOE.

Specifically, DOE exerted no direct control, supervision or evaluation over Ms. Gass' employment with LMES. Rather, LMES hired, supervised, paid, assigned, and evaluated its employees, including Ms. Gass. Although through the contract, DOE did control the strategic

[18]*See Jenkins v. U.S. Environmental Protection Agency*, 1992 CAA 6 (Sec'y May 18, 1994).

direction of LMES' work, the contract did not provide authority for DOE's interaction with individual LMES employees. To the contrary, LMES and DOE contractually agreed that LMES' employees were not to be considered DOE employees.

DOE maintains that in the absence of an traditional employer-employee relationship, it is not subject to the environmental statutes and the respective whistleblower complaints by Ms. Gass. However, as the ARB has explicitly stated in *Stephenson v. NASA*, 1994 TSC 5 (ARB July 18, 2000) consideration of the traditional employer-employee factors set out in the *Darden* decision is not the end of the analysis in these cases. Reiterating its remand language to an administrative law judge, the Board stated:

> [I]n a hierarchical employment context, an employer that *acts* in the capacity of employer with regard to a particular employee may be subject to liability under the environmental whistleblower provisions, notwithstanding the fact that employer does not directly compensate or immediately supervise the employee. A parent company or contracting agency acts in the capacity of an employer by establishing, modifying or otherwise interfering with an employee of a subordinate company regarding the employees's compensation, terms, conditions or privileges of employment. (*Stephenson*, slip op. at page 8, (emphasis in original text)).

Upon consideration of the ARB's directive in *Stephenson*, two possible avenues exist for finding DOE an employer of Ms. Gass despite the absence of a direct employer-employee relationship. The first possibility is that the DOE/LMES contract itself gave sufficient authority to DOE to establish, modify, or interfere with LMES employees' conditions and privileges of employment. Any detailed evaluation in that regard has been cut short by the ARB.

As most of the parties in this case are aware, DOE, LMES, and Mr. Slavin have previously presented to the ARB the question of whether the DOE/LMES contract renders DOE an employer of LMES employees. In *Williams v. Lockheed Martin Energy Systems, Inc.*, 1995 CAA 10 (ARB Jan. 31, 2001), the Board determined in a two to one decision that the contract standing alone was an insufficient basis to conclude DOE was also an employer of a LMES employee for the purposes the environmental statutes. Although the dissenting appellate judge believed DOE's "overriding authority" under the contract brought the contracting agency within the "scope of employer coverage" (*Id.*, slip op., page 16), the other two Board Members concluded the doctrine of joint employer indicated the LMES/DOE contract, **"without more**," did not establish a joint employer relationship (*Id.*, slip op., pages 10-11 (emphasis in original text)).

A second potential way DOE could be become an employer of Ms. Gass beyond the common law meaning requires DOE to have taken some definitive action that affected Ms. Gass' employment with LMES. To set the stage for evaluating this premise, I must first piece together portions of Ms. Gass' complaint and the parties' briefs, and respective declarations and affidavits.

As I reconstruct the events leading to the present complaint, while employed by LMES, Ms. Gass engaged in an alleged protected activity which resulted in an alleged retaliatory, adverse personnel action by LMES. At some time, Ms. Gass pursued a remedy through the DOE IG complaint process and was apparently dissatisfied with the result. Ms. Gass stopped physically working for LMES in October 1996 and LMES eventually terminated Ms. Gass' employment in April 1997 due to her long term disability. Ms. Gass initiated a whistleblower complaint against LMES, 2000 CAA 22, which based on its case number was received by the Office of Administrative Law Judges sometime between October 1999 and September 2000. Around August 2000, DOE did not renew its contract with LMES. As her whistleblower complaint against LMES proceeded through the administrative investigative and adjudicative process, Ms. Gass submitted a FOIA request to DOE seeking documents related to the DOE IG's inquiry of her complaint. In May 2001, Ms. Gass learned that the requested information has been destroyed.

Ms. Gass alleges the missing documents are relevant in her pending whistleblower complaint against her former employer, LMES, and their destruction interferes with her right to fair trial and full discovery in that case. While those concerns are not insignificant, the central inquiry in relation to her environmental whistleblower complaint against DOE is whether DOE, in this setting may be considered a "joint employer." As set out by the ARB, two factors must be present to hold a contracting agency responsible, for purposes of the environmental statutes, as an employer of a subcontractor's employee.

First, according the ARB in *Stephenson*, a "hierarchical employment context" must exist between LMES and DOE. During Ms. Gass' employment and through at least August 2000, such a relationship existed between DOE and LMES. At the same time, the record is insufficient to determine whether the DOE disposition of the documents occurred while the DOE/LMES contract remained in existence. Despite that lack of information, and even assuming that the contract was still in effect at the time of the DOE action, I am still able to resolve the jurisdictional issue based on the absence of the second requisite factor.[19]

As the ARB determined in *Williams,* more than just the hierarchical contract relationship must exist. However, the Board didn't specify what act might satisfy that standard. As a consequence, I return to the facts in *Stephenson* for insight on what might constitute a contracting agency acting "in the capacity of employer with regard to a particular employee,"[20] under authority of its contract with the subordinate employer.

In *Stephenson*, the complainant was an employee of Martin Marietta Corporation, which was under contract with NASA at the Johnson Space Center. The complainant alleged NASA engaged

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[19]Arguably, if that hierarchial relationship did not exist at the time of the information destruction by DOE, then the first requisite for jurisdiction over DOE is missing and the claimed status of "employer" for DOE becomes even more tenuous. It is not clear whether the case law previously discussed concerning former employers and post-employment acts would also apply to a former contracting agency.

[20]*Stephenson,* slip op. page 11 (emphasis in the original text).

in whistleblower discrimination by interfering with her employment by barring her from the Johnson Space Center and prohibiting her discussions with other NASA employees. Ultimately, the Board dismissed the complaint on the grounds that the complainant's actions were not protected activities. While not rendering a decision on whether NASA was an employer of the complainant, the ARB stated the appropriate inquiry would be:

> whether NASA's substantial involvement in the Stephenson's work environment (*e.g.*, its bar on her working in, or even entering, the Space Complex, and NASA's action prohibiting Stephenson from talking with her NASA counterparts) rose to a sufficiently intense level of involvement and interference in Stephenson' employment that NASA might be held to come within the ambit of the CAA's whistleblower protection provision. *(Stephenson*, slip op. page 13).

In Ms. Gass' situation relating to the purported destruction of investigative notes, DOE did not exercise control over the production of her work. Likewise, in regard to the lost documents, DOE did not establish or modify the terms, conditions and privileges of her employment. Thus, DOE will be found to be an employer only if its act relating to the documents interfered with the terms, conditions or privileges of employment.

While the loss of the documents does not appear to affect the terms and conditions of her former employment with LMES (especially if she was no longer employed by LMES at the time of the destruction), one of Ms. Gass' privileges of employment with LMES was the right to engage in whistleblower protected activities without adverse consequences. However, upon extended consideration of the alleged relationship between the destroyed information and Ms. Gass' privileges of employment as a basis for jurisdiction over DOE, I conclude the complaint is insufficient to hold DOE as an employer within the meaning and interpretations of the environmental whistleblower protection provisions.

The initial defect in the complaint is the absence of an allegation that DOE acted within the parameters of its hierarchical employment relationship with LMES. DOE's action concerning IG investigative notes must fall within the bounds of the hierarchical employment relationship between DOE/LMES such that DOE was acting in place of LMES as Ms. Gass' employer at the time the documents were destroyed. I reach this conclusion based on the ARB's emphasis on the requirement for active exercising of control over the complainant's work environment. Although the DOE/LMES statement of work gave DOE "general" control over LMES' work, the information presented in the complaint, even in light of reasonable inference, is insufficient to conclude the activities of the DOE IG office and the subsequent action concerning DOE IG documents were meant to be part of, or accomplished under authority of, the LMES/DOE contract and a joint employer relationship. As a result, I conclude that DOE's actions relating to the documents eventually sought by Ms. Gass occurred outside, rather than within, the context of the DOE/LMES hierarchical employment relationship.

Additionally, again based on ARB interpretations and guidance, for DOE to be considered Ms. Gass' employer in this case, DOE's alleged interference with a privilege of Ms. Gass' employment with LMES must be substantial. In an attempt to establish the requisite substantial interference with a work privilege, Ms. Gass presents two inferences. First, she claims the missing documents were relevant and material to her litigation against LMES. To make this point, Mr. Slavin presents a series of cases and quotations setting out the policy of adverse inference. That is, arguably, because DOE destroyed the documents and thus is unable to produce them, an adverse inference must be drawn that the documents contained information against both the interests of DOE and, more importantly, LMES. Although such an inference against DOE may be appropriate, as I have noted before, there is no allegation that LMES participated in the destruction of the documents in any manner. Consequently, an inference that the missing documents were detrimental to LMES' interests is neither warranted nor particularly reasonable.

To complete the substantial work privilege interference connection, a second, and even more speculative, inferential jump is necessary. Ms. Gass asserts that the loss of the documents in DOE's possession will have an adverse effect on the success of her litigation against LMES. Of course, this inference itself rests on the first inference that the documents were adverse to LMES, which I have found lacking. Significantly, even if the missing material was adverse to LMES' interest, the second inference that the loss of such information would prove sufficiently detrimental to Ms. Gass' whistleblower case against LMES, and thus amount to substantial interference by DOE of a work privilege, is exceptionally speculative, indeterminable, and thus unreasonable.

Ms. Gass' complaint against DOE, and the jurisdictional basis for finding DOE her employer in this case, rests on both an unwarranted inference and a highly speculative inference. Consequently, in the absence of reasonable inferences, I find the complaint insufficient to establish DOE's act of disposing of documents rose to the requisite "substantial" or "intense" level of involvement with Ms. Gass privilege of LMES employment contemplated by the ARB in *Stephenson* and *Williams*.

In summary, because DOE did not change, alter, or otherwise interfere with Ms. Gass' employment with LMES within the DOE/LMES contractual framework, and the complaint relies on unwarranted and unreasonable inferences, DOE is not Ms. Gass' employer, or a joint employer. Accordingly, since at the time of the purported adverse action DOE was not an employer of Ms. Gass either under the *Darden* common law standard or the *Stephenson* joint employee standard, the complaint against DOE must be dismissed.

RECOMMENDED DECISION AND ORDER

1. Ms. Linda Gass' whistleblower complaints under the Clean Air Act, Safe Drinking Water Act, and Solid Waste Disposal Act against Lockheed Martin Energy Systems are **DISMISSED**.

2. Ms. Linda Gass' whistleblower complaints under the Clean Air Act, Safe Drinking Water Act, and Solid Waste Disposal Act against Mr. James Pugh are **DISMISSED.**

3. Ms. Linda Gass' whistleblower complaints under the Clean Air Act, Safe Drinking Water Act, and Solid Waste Disposal Act against Ms. Sandy Schneider are **DISMISSED.**

4. Ms. Linda Gass' whistleblower complaints under the Clean Air Act, Safe Drinking Water Act, and Solid Waste Disposal Act against the U.S. Department of Energy are **DISMISSED**.

SO ORDERED:

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RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: November 19, 2002
Washington, D.C.

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §§ 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§§§ 24.7(d) and 24.8.